IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1327

G. B. SCOTT, ADMINISTRATOR OF THE ESTATE OF THOMAS A. SCOTT, DECEASED,

Plaintiff,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, A CORPORATION,

Defendant.

PETITION OF JAMES A. DOOLEY FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROYAL W. IRWIN,
Attorney for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

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To the Honorable, the Chief Justice and the Associate Justice of the Supreme Court of the United States:

The petition of James A. Dooley respectfully shows:

(1) The plaintiff, G. B. Scott, Administrator of the Estate of Thomas A. Scott, Deceased, brought an action against the defendant, The New York, Chicago and St. Louis Railroad Company, under the Federal Employers' Liability Act, to recover damages for the wrongful death of Thomas A. Scott, in the United States District Court for the Northern District of Illinois.

It was alleged in the complaint that the deceased left him surviving Gloria Scott, his widow, Marilyn Joyce Scott, his daughter, and Terry Allen Scott, his son, who were deprived of their means of support.

James A. Dooley, petitioner, filed his Petition in the United States District Court for the Northern District of Illinois alleging that said G. B. Scott, as Administrator of the Estate of Thomas A. Scott, deceased, employed said Dooley as his attorney to represent him in the settlement, adjustment and prosecution of his claim as Administrator against the defendant because of the wrongful death of Thomas A. Scott, and agreed to pay said Dooley as compensation for his services, and assigned to him, one-third of any sum obtained or recovered therefrom by suit, settlement or otherwise; that the defendant was duly served with notice of lien of Dooley upon said cause of action; that thereupon the said Dooley filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, the suit referred to above to recover damages for the widow and next of kin of said decedent.

It is further averred in said petition that thereafter Gloria Scott was also appointed Administratrix of the Estate of Thomas A. Scott, deceased, in Indiana, and filed a suit entitled "Gloria Scott, as Administratrix of the Estate of Thomas A. Scott, Deceased *vs.* The New York, Chicago and St. Louis Railroad Company," No. 9166-S, in the Superior Court of Delaware County, State of Indiana; that on the same day on which suit was filed summons issued and the defendant filed its answer; that thereafter, in a manner previously agreed upon by the parties, the case was submitted to the Court for a trial without a jury, and the Court entered an order finding the defendant guilty and assessing the plaintiff's damages at the sum of $15,000.00.

It is further averred in said petition that said suit so brought by Gloria Scott was settled and adjudicated without the knowledge of petitioner, and that said suit was filed and judgment entered thereon pursuant to a collusive agreement between Gloria Scott and the said Railroad Company long after said Railroad Company had notice of petitioner's claim for lien.

Petitioner prayed the United States District Court to enter an order enforcing his lien and decreeing that he was entitled, by virtue of said lien, to one-third of $15,000.00. (Transcript, 21.)

The United States District Court denied the petition, holding that petitioner's lien will not attach until his client recovers judgment or in some manner recovers some money or property as a result of petitioner's efforts. (Tr. 51.)

An appeal was taken by petitioner to the Circuit Court of Appeals for the Seventh Circuit. The judgment was affirmed by a divided court, and this petition is filed to induce the Supreme Court of the United States to reverse the judgment of the Circuit Court of Appeals.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 287, Section 56.

Judgment was entered in the Circuit Court of Appeals on February 4, 1947.

The case is reported in 159 Fed. (2d) 618.

QUESTIONS PRESENTED.

The Attorney's Lien Law of Illinois provides:

> "That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action. Provided, however, such attorneys shall serve notice in writing, which service may be made by registered mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action, and such lien shall attach to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the aforesaid notice. * * *" (Chap. 13, Par. 14, Ill. Rev. Stat. 1945.)

G. B. Scott was appointed Administrator of the Estate of Thomas A. Scott by a Probate Court in Illinois. The validity of his appointment was approved on an appeal. G. B. Scott, as Administrator, was authorized under the law to employ an attorney to prosecute the claim of the Estate against the defendant to recover damages under the Federal Employers' Liability Act for the wrongful death of the deceased. Petitioner Dooley was employed by G. B. Scott, Administrator, to prosecute the claim, and the Administrator agreed to pay him for his services one-third of the amount recovered. The Statute required a notice

of lien to be served on the defendant in order to render the lien effective. Upon the service of such notice, Petitioner Dooley then had a lien upon all "causes of action, including all claims for unliquidated damages" for the wrongful death of Thomas A. Scott, deceased.

The deceased, Thomas A. Scott, left him surviving two small children, who were the offspring of former wives of the decedent. These children did not live with the deceased's widow, but resided in Illinois with paternal relatives, and it was because of the residence in Illinois of these minor children that G. B. Scott was appointed Administrator.

While the suit brought by G. B. Scott as Administrator was pending in the United States District Court, Gloria Scott and representatives of the Railroad Company connived to settle the case in Indiana. Gloria Scott was appointed Administratrix in Indiana, and on the same day a suit was filed, summons issued and served, an answer filed, the case called for trial, and an agreed judgment in the sum of $15,000.00 entered and satisfied.

Petitioner contends that his lien attached to the cause of action, and that his claim for lien cannot be defeated by the payment of the money to a foreign Administrator subsequently appointed.

The Circuit Court of Appeals held that, since there was no fund or money that had been received by G. B. Scott, Administrator, there was nothing upon which the lien could attach.

We contend that G. B. Scott, as Administrator, had ample authority to retain Dooley as his attorney, and that upon the proper service of notice of lien the lien attached to the cause of action. The cause of action itself was impressed with the lien, and the Railroad Company could not settle it without first accounting to Dooley.

REASONS FOR ALLOWANCE OF WRIT.

The attachment of an attorney's lien to a cause of action arising under the Federal Employers' Liability Act is so intimate as to directly affect the right itself, and must, therefore, be considered as a federal question.

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

The Circuit Court of Appeals has decided a supposed question of local law in a way probably in conflict with applicable local decisions.

It is submitted that these reasons call for the exercise of this Court's power of review.

Wherefore petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination, on a day certain named therein, a complete transcript of the record in the case numbered and entitled on its dockets as No. 9145, G. B. Scott, Administrator of the Estate of Thomas A. Scott, Deceased, Plaintiff *vs.* The New York, Chicago and St. Louis Railroad Company, a corporation, Defendant; that the judgment of the Circuit Court of Appeals be reversed by this Court; and that Petitioner may have such other and further relief as seems just.

JAMES A. DOOLEY,
Petitioner,

By ROYAL W. IRWIN,
Attorney for Petitioner.

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Plaintiff,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, A CORPORATION,

Defendant.

BRIEF IN SUPPORT OF PETITION OF JAMES A. DOOLEY FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A Federal Question Involved.

The main suit in this matter was to recover damages under the Federal Employers' Liability Act for the wrongful death of Thomas A. Scott.

Petitioner James A. Dooley filed his intervening petition in this law suit in the United States District Court to compel the defendant to recognize his lien for attorney fees.

The United States District Court had jurisdiction of the

subject matter by reason of the fact that the original cause of action arose under the Federal Employers Liability Act. The attorney's lien which Dooley had attached directly to the cause of action, of which the Court already had jurisdiction. The Federal Court, having jurisdiction of the cause of action, to which was attached an attorney's lien, would naturally retain jurisdiction until it had completely disposed of all matters connected with it.

It cannot be assumed that Congress did not intend that the Federal Court should retain jurisdiction of a suit to enforce a right arising under the Federal Employers Liability Act and dispose of any liens which might attach to the cause of action while the matter was within the jurisdiction of the Court.

The Federal Employers Liability Act was passed by Congress having in mind that liens might attach to a cause of action which is the subject of a suit pending in the United States District Court, and, having jurisdiction, the Court would keep control of the matter until all questions were settled.

The United States Supreme Court allowed an appeal in the case of *Dickinson* v. *Stiles*, 246 U. S. 631, 62 L. Ed. 908, which involved a similar situation. In that case it appears that one Holloway sued the Railroad Company under the Federal Employers' Liability Act for personal injuries and engaged the defendant in error, Stiles, as his attorney, agreeing to pay him one-third of the amount recovered. Before trial the Railroad Company settled by paying $6500.00. Stiles filed a petition in the cause and claimed his fee pursuant to his contract. There was a judgment entered in his favor. The Railroad Company claimed that a lien could not attach to a cause of action arising under the Federal Employers' Liability Act because the Acts of Congress supersede all legislation on

the subject of the liability of railroad companies to their employees. The Court said:

> "Congress cannot have contemplated that the claims to which its action gave rise or power would be paid in all cases without litigation, or that suits would be tried by lawyers for nothing, yet it did not regulate attorneys' fees. * * * We see no reason why it should be supposed to have excluded ordinary incidents of state procedure. * * *
>
> "We presume that it would not be contended that the Employers' Liability Act prevented the assignment of a judgment under it in such form as was allowed by the law of Minnesota, or that it allowed the defendant to disregard such an assignment after notice."

In that case the United States Supreme Court considered the matter on its merits, sustained the lien, and affirmed the judgment.

The Circuit Court of Appeals Misinterpreted the Law of Illinois.

The Attorneys' Lien Act of Illinois (Chap. 13, Par. 14, Ill. State Bar Ass'n Rev. Stat. 1945) provides that attorneys shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, for the amount of fee agreed upon between the attorney and his client, which lien shall attach to any verdict, judgment or decree entered on account of said claim, demand or cause of action.

When an employee is injured under circumstances creating a liability on the part of a railroad company, there can be but one cause of action, although many suits may be brought to recover damages on account of it.

Likewise, administrators may be appointed in different jurisdictions to recover damages under the Federal Employers' Liability Act for the wrongful death of an em-

ployee. If a claimant under the Federal Employers' Liability Act were to employ more than one attorney to prosecute his cause of action, each attorney so employed might be entitled to a lien on the cause of action. In such a case, the defendant might be required to call all of the attorneys before the court to adjust the matter of priority of attorneys' liens before paying out or before adjusting the claim.

Likewise, where more than one administrator of the estate of a deceased person has been appointed and they have retained attorneys to prosecute a cause of action, the Court might well, upon the request of the defendant, adjust the matter of priority of liens. But that was not done in this case.

G. B. Scott, who was the administrator in Illinois, representing the interests of the minor children of the deceased, retained petitioner Dooley to prosecute his claim. Upon the service of notice, the Dooley lien was attached to the cause of action.

It is apparent from the circumstances that the Railroad Company connived with the widow to circumvent the suit pending on behalf of G. B. Scott, Administrator, in the United States District Court.

The law is clearly established in Illinois that the Dooley lien attached to the cause of action and the Railroad Company could not avoid the legal consequences by attempting to settle the same cause of action with another administrator.

The opinion of the majority in the Circuit Court of Appeals was that, since there is no fund nor money that has been received by Dooley's client, there was nothing upon which the lien could attach. (Tr. 69.) It was only by reason of the circumvention of the defendant that the client did not receive the money. The opinion of the

Circuit Court of Appeals is based on an utter misconception of the law. The dissenting opinion clearly shows the misconception of the law in the majority opinion.

The leading case in Illinois is *Standidge* v. *Chicago Railways Company*, 254 Ill. 524, where the Court said:

> "Clearly it was the intention of the legislature to give attorneys a lien from and after the service of notice on the defendant, which would protect them against any settlements that might thereafter be made, regardless of whether the suit had been commenced, was pending or had been finally determined by the rendition of a judgment. • • •
>
> "A settlement may be made with a claimant, under this statute, to the same extent and with like effect as it could have been made before the statute was enacted, the only difference being that under the statute a party, in settling with an attorney's client, must take into account his liability to the attorney for whatever amount of fees would accrue under his contract at the time of the settlement."

In *Baker* v. *Baker*, 258 Ill. 420, the Court said:

> "By serving the notice claiming a lien the attorney in effect becomes a joint claimant with his client in any judgment or decree that may be rendered or in the proceeds of any settlement that may be made by the client, and to the extent of the amount of his fee has the same interest in such proceeds, judgment or decree as his client and is entitled to his pro rata share thereof."

In *Smith* v. *Louisville & Nashville R. Co.*, 313 Ill. App. 396, a contract on a contingent fee basis was made in Ohio between an attorney and client to prosecute a suit under the Federal Employers Liability Act for injuries occurring in Kentucky. Notice of lien was served on the defendant, and suit was filed in Illinois. Before trial, however, defendant made a settlement directly with the plaintiff and

without the knowledge of his attorney. The attorney filed a petition to enforce the lien in the same proceeding, and the Appellate Court, in holding the petition enforceable, said at page 404:

> "The suit having once been filed in a court of this State, such lien, under the Illinois Statute, at once attached to the cause of action and could not thereafter be destroyed by the settlement which was made by defendant, without the consent of such attorneys. Under such Attorney's Lien Law the contract of employment and service by such attorneys of notice of lien operated as an assignment of 40 per cent interest in any judgment that might be rendered in the case, or in the proceeds of any settlement that might be made by defendant with the client of such attorneys claiming the lien. (*Baker* v. *Baker,* 258 Ill. 418.)"

In *McArdle* v. *Great American Indemnity Company,* 314 Ill. App. 455, it appeared that the plaintiff, an attorney, whose client compromised her claim directly with an insurance company representing wrongdoer, brought an action to enforce his lien against the insurer. He recovered a judgment, which was affirmed. The Court, in holding that the lien operated in law so as to make the attorney a joint owner of his client's claim, said at page 463:

> "Plaintiff, to the extent of the amount of his fees, had the same interest in the proceeds of the settlement as Mrs. Fricot. The attorney's lien proceeding was a part of the *Fricot* v. *Brady* suit, and in that suit plaintiff demanded his one-third of the amount of the settlement made by defendant for damages imposed by law for bodily injuries to Mrs. Fricot. Plaintiff's judgment against Brady was, in effect, for his part of the damages that arose as a result of said injuries. His claim against defendant in the instant case is, in effect, a claim for his part of the damages that arose as the result of said injuries. Plaintiff acquired his part of the settlement by operation of law, and defendant is liable for that part."

To the same effect see *Tulka* v. *Chicago City Ry. Co.*, 250 Ill. App. 234; *Dreyfus* v. *Frend*, 209 Ill. App. 345; and *Eckwall* v. *Eckwall*, 299 Ill. 621.

The fact that the money was paid to another administrator subsequently appointed does not affect petitioner's lien.

It is to be noted that after Scott, client of the petitioner, had been appointed administrator of the estate of his deceased son, after notice of lien had been served upon the defendant, after suit had been filed in the United States District Court, another person was appointed administrator, that this administrator filed another suit in the Superior Court of Delaware County, Indiana, and that the very day suit was filed an appearance was entered by defendant's attorney and a judgment obtained.

It is patent that these proceedings were undertaken for the purpose of avoiding trial in the United States Court and to circumvent, if possible, petitioner's claim of lien.

There was but one cause of action. As soon as notice of petitioner's lien was served upon defendant, it attached to and became a lien on that cause of action. Regardless of who was thereafter appointed administrator of the decedent's estate, the lien was still operative. Indeed, if the law were otherwise, then the purpose of the Act would be vitiated. If it could be possible for a defendant to procure the appointment of a second administrator so as to avoid the lien of the attorney for the original administrator, the Attorney's Lien Act would be meaningless. The question before this court is whether a party upon whom a lien has been served can circumvent that lien merely by having another person appointed administrator.

In the recent (November, 1945) case of *Bennett* v. *C. & E. I. R. R. Co.*, 327 Ill. App. 76, the very same facts were presented in a petition to enforce a lien. Ernest Deck was appointed administrator of two decedents by an order

of the Probate Court of Vermilion County, Illinois. Thereafter he entered into an agreement as administrator with plaintiff, Edwin L. Bennett, a Chicago attorney, retaining him "to prosecute and/or settle all suits and claims for damages against the Chicago & Eastern Illinois Railroad Company, on account of personal injuries and property damage arising out of an accident" which resulted in the deaths of the two decedents and wherein he agreed to pay Bennett as compensation for his services a sum equal to one-third of any amount realized from said claims, either by settlement or by judgment. Bennett served notice upon the railroad of his attorney's lien by virtue of this contract.

Thereafter the appointment of Ernest Deck as administrator of the estates of the two decedents was revoked and one Hamilton appointed to succeed him. Subsequent to his appointment as administrator Hamilton settled the claims for $1,750.00 each. No release of lien was taken from Bennett. He filed his petition for the purpose of enforcing his lien.

The trial court found the issues for him, and the Appellate Court affirmed the trial court, pointing out that even if the Letters of Administration were revoked, it was immaterial, saying:

> "In view of our conclusion that plaintiff's contract with the first administrator was a valid undertaking, and that the railroad company had knowledge thereof and notice that he claimed a lien by reason thereof, it would logically follow that when the railroad company settled the claim with the second administrator without notifying plaintiff, it did so at its peril and should therefore be subjected to the liability contemplated by the statute, because under Chapter 3, Section 441, of Administration of Estates (Ill. Rev. Stat. 1943), 'when the letters of an executor, administrator * * * are revoked, all acts done by him according to law prior to the revocation of his letters are valid.' "

The Circuit Court of Appeals erroneously relies upon *Bremer* v. *L. E. & W. R. R. Co.*, 317 Ill. 580. As pointed out in the dissenting opinion, the conclusion in that case rested upon the fact that the order appointing the public administrator was unauthorized, and the fact that the public administrator, having been wrongfully appointed, had no authority to employ counsel and thereby create a lien on the cause of action. It is entirely different from the case at bar, because in this case the appointment of G. B. Thomas as Administrator has been affirmed on appeal. (Tr. 28.)

In the case of *Dickinson* v. *Stiles*, 246 U. S. 631, 62 L. Ed. 908, the United States Supreme Court had before it a case arising under the Federal Employers Liability Act and assumed jurisdiction to correct a supposed error in the judgment of the Supreme Court of Minnesota where the railroad company settling the case refused to recognize the lien of the attorney.

The instances where suits are settled by railroad companies without the recognition of attorneys' liens are numerous, but few claims of this kind reached the courts of appeal. It would seem desirable that the United States Supreme Court clear the law applicable in cases of this kind.

Conclusion.

It must be apparent that the Circuit Court of Appeals has improperly applied rules of law in this case. We pray that this Court will grant our petition and consider this appeal upon its merits.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.

FILE COPY

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

HAROLD A. SMITH,
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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

REASONS FOR DENIAL OF THE WRIT.

Certiorari to review the judgment of the Seventh Circuit Court of Appeals should be denied because:

(1) No federal question is involved:

The sole question is whether petitioner, acting as attorney for an Illinois administrator, had a valid attorney's lien under the Illinois Attorneys' Lien Act which attached to a recovery made by an Indiana administrator for the same death under the Federal Employers' Liability Act.

It is settled law that whether an attorney in a Federal Employers' Liability Act case has a valid attorney's lien is to be determined by the law of the state claimed to have provided for the lien. (*Dickinson* v. *Stiles*, 246 U. S. 631.)

(2) The Illinois state law was correctly applied by the Circuit Court of Appeals and the District Court:

The dissent in the Court of Appeals by Judge Evans violates the well established rule that the construction of a state statute by the highest court of the state is binding on federal courts (*Leffingwell* v. *Warren*, 2 Black 599, 603), by refusing to follow *Bremer* v. *L. E. & W. R. R. Co.*, 317 Ill. 580, 148 N. E. 241, on theory that that Illinois decision is "violative of the [Illinois] statute."

SUGGESTIONS.

Issue.

The question is whether, under the Illinois Attorneys' Lien Act, an attorney who has brought a death action under the Federal Employers' Liability Act against the Railroad on behalf of an Illinois administrator is entitled to recover a fee from the Railroad measured by the amount recovered by another administrator and another attorney appointed for the same decedent in the state of the decedent's domicile, Indiana, when the Indiana action is first reduced to judgment, thereby precluding any recovery by the Illinois administrator.

The District Court and the majority of the Court of Appeals held in the negative on the ground that petitioner-attorney failed to recover anything for his client, the Illinois administrator, and that there was nothing to which his claimed lien could attach under the Illinois Attorneys' Lien Act as construed by the Supreme Court of Illinois in an almost identical situation. (*Bremer* v. *L. E. & W. R. R. Co.*, 317 Ill. 580, 148 N. E. 241.)

Argument.

The petition for certiorari asserts that a question of federal law is involved. This is not even a colorable assertion because this court in *Dickinson* v. *Stiles,* 246 U. S. 631, held in an opinion by Mr. Justice Holmes, that whether an attorney in a Federal Employers' Liability Act case is entitled to an attorney's lien is to be determined solely under the state law.

Petitioner places his real reliance on the proposition that the Circuit Court of Appeals misinterpreted the law of Illinois, asserting that the opinion of the majority of the judges of the Circuit Court of Appeals is incorrect and that the dissent of Judge Evans is correct. That proposition can be sustained only by disregarding the decision of the Supreme Court of Illinois in *Bremer* v. *L. E. & W. R. R. Co.,* 317 Ill. 580, 148 N. E. 241, which is precisely in point, and construing the Illinois statute in a contrary manner. This is exactly what the dissenting judge in the Circuit Court of Appeals did. He did not distinguish the Illinois decision or find it inapplicable. He found it to be wrong. We submit that even in that he was erroneous—the Illinois decision is a correct construction of the Illinois statute. But, right or wrong, Illinois has construed its statute and that construction is binding on the federal judiciary.

In *Bremer* v. *L. E. & W. R. R. Co.,* 317 Ill. 580, 148 N. E. 241, the decedent, a resident of Indiana, was killed in Illinois. The Illinois public administrator took our letters of administration and was authorized by the Illinois

Probate Court to, and did, employ attorneys to sue the railroad company under the Federal Employers' Liability Act. Decedent's widow, also an Indiana resident, secured appointment of an administrator in that state. Both administrators filed action in their respective states. The Indiana action was reduced to judgment which was paid. Thereafter the attorneys for the Illinois administrator filed petition for a lien of one-third of the sum recovered in the Indiana action.

The Illinois Supreme Court held that since nothing had been recovered by the Illinois administrator, his attorneys had no claim for fees.

The only difference between the foregoing case and the case at bar is that here the main Illinois action had been dismissed at the time petitioner, Dooley, filed his petition and it therefore had been finally adjudicated that his client (the Illinois administrator) was entitled to recover nothing, while in the *Bremer* case the main Illinois action had not yet been disposed of at the time of the decision of the Illinois Supreme Court, although it was apparent that the Indiana judgment barred recovery in Illinois.

The majority opinion in this case recognized that the decision in the *Bremer* case was controlling (Tr. 69). Dissenting Judge Evans refused to follow it on the grounds "it is clearly violative of the statute" (Tr. 75). It is hardly necessary to cite authority for the proposition that it is not for a federal court to say whether a construction put on a state statute by its Supreme Court "violates" the statute. Long before *Erie Railroad* v. *Tompkins*, 304 U. S. 64, it was settled that "the construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the stat-

ute, and is as binding upon the Courts of the United States as the text." *Leffingwell* v. *Warren*, 2 Black 599, 603.

Judge Evans further went on, not to distinguish the decision factually, but to assert that the real reason for the decision was that:

> "The facts disclosed the appointment of a public administrator was unauthorized. An order of such appointment was void. The public administrator had no authority upon the facts disclosed to maintain suit on the death claim. Having no authority to bring the action he was without authority to employ counsel to bring such an action and create a lien against the cause of action therefor. * * * I think the opinion should be read as holding the public administrator could not employ the counsel and bring the action to recover for a death upon the facts shown in that case to exist." (Tr. 75.)

Petitioner, like the dissenting judge, makes no attempt to distinguish the *Bremer* case factually but adopts the above explanation (Br., p. 15).

There are two answers to these assertions:

1. There is nothing in the *Bremer* opinion which states or even intimates that the decision in the case was based on the grounds that the appointment of the public administrator was void.

2. In another case arising out of the same accident the Supreme Court of Illinois squarely held that the appointment of the Illinois public administrator could not be collaterally attacked by the railroad on the grounds that the decedent was really a resident of Indiana, and not of Illinois, at the time of his death. Such collateral attack could have been made if the appointment was void. We refer to *Bremer* v. *L. E. & W. R. R. Co.*, 318 Ill. 11, decided the

same day as the *Bremer* case in 317 Ill. 580, which was an action brought by the same public administrator for the death of another person who was killed in the same railroad wreck.

In view of the foregoing decision, both petitioner and Judge Evans are in error in attempting to explain the first *Bremer* decision on the grounds above set forth. Statements more directly contrary to the law of Illinois cannot be imagined.

Petitioner also relies upon some decisions of the Supreme Court of Illinois decided *prior* to the *Bremer* case and some decisions of the Appellate Courts of Illinois. Those that might be considered as in any way bearing on the present case are cases where there was an agreement by the attorney with the client for fees, and rendition by the attorney of services for the client and a subsequent settlement *by the defendant with the client* without withholding the amount to which the attorney was entitled under his agreement with the client. In this case respondent did not settle with petitioner's client. Petitioner also strongly relies on the recent Appellate Court decision of *Bennett* v. *C. & E. I. R. R. Co.*, 327 Ill. App. 76. We adopt as our own the Court of Appeal's clear distinction between that case and the one at bar (Tr. 70, 71).

We cannot let pass unanswered the gratuitous assertion of counsel that "The question before this court is whether a party upon whom a lien has been served can circumvent that lien merely by having another person appointed administrator" (p. 13). There is no showing that respondent had the Indiana administrator appointed, and counsel refers to no statutes of Indiana under which it would be

possible for respondent, an unliquidated damage debtor of decedent's estate, to have such appointment made even if it desired to do so.

We respectfully request that the petition be denied.

Respectfully submitted,

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WINSTON, STRAWN & SHAW,
of Counsel.